88-1652

Supreme Court, U.S.
FILED
APR 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

ROGER EMERICK,
Petitioner,

v.

WALTER BORDEN, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF CONNECTICUT

Pro Se Petitioner:

ROGER EMERICK
580 Hopewell Road
S. Glastonbury, CT 06073
(203) 659-0130

Printed by
Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4254

QUESTION PRESENTED

Did it violate plaintiff's right to due process to have his case termintated after the pleadings were closed for an alleged pleading defect, raised sua sponte by the court, where plaintiff was not given notice that the court was considering this defect, was not given an opportunity to oppose such allegation by written memorandum, and was not given an opportunity to amend his complaint to correct this pleading defect?

PARTIES TO THE CASE

Petitioner/Plaintiff:

Roger C. Emerick, 580 Hopewell Rd., S. Glastonbury, Ct. 06073

Respondent/Defendants:

Dr. Walter A. Borden and his wife Edene Borden, 37 Candlewood Dr., W. Hartford, Ct. 06117

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE CASE	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	17
APPENDIX	1A

TABLE OF AUTHORITIES

Cases Page(s)

BOUCHER AGENCY, INC. V. ZIMMER
160 Conn. 404, 409 (1971) 6,7

CALIFORNIA DIVERSIFIED PROMOTIONS,
INC. V. MUSICK, 505 F.2d 278
(1974)..... 14

EMERICK V. BORDEN et al,
17 Conn. App. 802, ...Throughout

FRANKOS V. LaVALLEE,
535 F.2d 1346 (1976) 13

FREEMAN V. CONTINENTAL GIN
COMPANY 381 F.2d 459 (1967) 12,13

GAUCK V. MELESKI, 340 F.2d 433
(1965)..... 11

TABLE OF AUTHORITIES (continued)

GUILIETTI V. CONNECTICUT INS.
PLACEMENT FACILITY,
205 Ct. 424 (1987) 9

JEFFERSON FOURTEENTH ASSOC. V.
WOMETCO de PURERTO RICO,
695 F.2d 524 (1983).....13,14,15

LEWIS V. STATE OF N.Y.,
547 F.2d 4 (9176) 13,15

PHARO V. SMITH, 621 F.2d 656
(1980) 12

OPINION BELOW

The CT. Superior Court did not issue an opinion. Its judgment is printed in the appendix hereto at p. 1A. The opinion of the Connecticut Appellate Court is reported as Emerick v. Borden et al, 17 Conn. App. 802, cert denied by the Ct. Supreme Court on 1-12-89, and is reprinted in the appendix hereto, pp. 10A and 11A.

JURISDICTION

This petition is from the final judgment of the Ct. Appellate Court on October 26, 1988 affirming judgment by the Ct. Superior Court on April 29, 1987. A petition for certification to the Ct. Supreme Court was timely filed December 28, 1988 and denied on January 12, 1989. The jurisdiction of this Court to review the judgment of the Ct. Appellate Court is invoked under 28 U.S.C. $1257.

CONSTITUTIONAL PROVISIONS INVOLVED

14th Amendment, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The plaintiff brought suit on Feb. 12, 1985 against the defendants, a physician and his wife, citing neglegent conduct in the performance of professional services and damages resulting therefrom. The

defendant, Dr. Walter Borden, is a well known forensic physician in the state.

The defendants moved to strike the complaint on the basis that this must be considered a malpractice claim and there was no allegation of a physician-patient relationship. The plaintiff filed an amended complaint citing he sincerely believed a physician-patient relationship existed. The defendants were satisfied and filed an answer.

After the pleadings were closed and the case positioned for trial the defendants moved for summary judgment. The court noted that the defendants did not prove their case for summary judgment. Then, on its own initiative, the court claimed that there was no "allegation" of a physician-patient relationship, only a statement by the pro se plaintiff that he "sincerely believed"

there was one. The court maintained that such an allegation is necessary to maintain an action for medical malpractice and noted that while this defect is generally pointed out by a motion to strike, it need not be. The court then granted the summary judgment solely on the basis of the alleged defect, thus terminating the case.

The plaintiff filed motions to reargue and also to replead to correct the defect. Both were denied by the court, noting that a summary judgment terminated the case.

Although plaintiff claimed a conflict of interest, the appeal went to the Appellate Court where defendant Walter Borden's brother, Judge David Borden, sits as an appellate judge! The decision was affirmed without comment. A petition for certiorari to the Ct. Supreme Court was denied.

REASONS FOR GRANTING THE WRIT

Plaintiff's case was terminated by the granting of a summary judgment solely on the grounds of an alleged pleading defect raised sua sponte by the court in private review of the motion. Plaintiff did not know any defect was being considered, did not have an opportunity to respond to it, and was not permitted an opportunity to correct the defect by amending his complaint. Essentially this amounted to a sua sponte motion by the court to dismiss a complaint for a pleading defect and using a summary judgment as a vehicle for that dismissal.

This writ should be granted to ensure that plaintiff, a non-lawyer pro se litigant, is accorded basic standards of procedural due process clearly spelled out by Connecticut Statutes, Rules of Practice and case precedent and as

supported by analogous rulings in the federal appellate courts.

In Connecticut both the General Statutes and the Practice Book establish rules for pleading designed so that litigants will not be deprived of due process.

Ct. Practice Book Sections 379 and 384 provide that a summary judgment is used where, after the pleadings are closed, and there are no issues of material fact, a judgment may enter as a matter of law. In this case however the summary judgment was used, solely on the courts own initiative, to point out a defect in the pleadings which it conceded is normally pointed out by a motion to strike. The court cited Boucher Agency, Inc. V. Zimmer, 160 Conn. 404, 409 (1971) as its' authority for using a summary judgment to point out a pleading defect. Boucher was

not analogous to the present case. It permitted a deviation in the usage of pleadings, where there was no prejudicial error, in terminating a case where there were no underlying facts that could have resulted in a viable cause of action, regardless of how pleaded. Contrary to Boucher, there was prejudicial error in Emerick where plaintiff could easily have amended his complaint to correct a defect claimed sua sponte by the court.

Ct. Practice Book Sec. 155 permits a case to be stricken for a defect in the pleading upon motion by the opposing party and after allowing memorandums from both sides. If a case is stricken for a defect, Section 157 permits 15 days to file a new pleading which corrects the defect. This is in accord with Ct. General Statute 52-130 which states: "Parties may amend any defect, mistake or

informality in the pleadings or other parts of the record or proceedings. When either party supposes that in any part of the pleadings he has missed the ground of his plea, and that he can plead a different plea that will save him in his cause, he may change his plea, answer, replication or rejoinder, as the case may be, and plead anew and the other party shall have a reasonable time to answer the same;" The plaintiff in Emerick was not permitted the opportunity to correct an alleged defect and replead because the defect was not pointed out on a motion to strike by the opposing party but sua sponte by the court during review of a summary judgment, the granting of which terminates the case.

Terminating the case by granting the summary judgment solely on the basis of a pleading defect was contrary to Ct.

General Statute 52-123 which provides that "... no pleading shall shall be abated, suspended, set aside or reversed for any kind of circumstantial errors, mistakes or defects, if the person and cause may be rightly understood and intended by the court" (emphasis added). This was upheld in Guilietti v. Connecticut Ins. Placement Facility, 205 Ct. 424 (1987) which held that where both parties know what the theory of recovery is and there will be no surprise to either one at trial, a technical deficiency should not nullify a cause of action. "Slight linquistic ambiguity does not serve to nullify a cause of action which is sufficiently raised to notify the defendant of its existance."

Ct. Practice Book Section 6 states that the rules of practice shall be liberally interpreted where it shall be

manifest that a strict adherance to them shall work surprise or injustice. There can be no doubt that plaintiff, upon reading the court's memorandum of decision, was certainly surpised and felt injustice when the court pointed out, sua sponte, a pleading defect discovered during private review of a summary judgment, and which plaintiff was then not permitted to correct.

According to the aforenoted Statute, Practice Book and case law of Connecticut, a plaintiff should be permitted the opportunity to correct a defect in his complaint. It does not make sense to allow the use of a Summary Judgment to point out technical defects in a pleading without permitting an opportunity to correct those defects because it prevents the plaintiff from having his day in court. Why use a

motion to strike, which permitts a replead, if you can use a summary judgment for the same end and prevent a repleading because there is no second chance with a summary judgment? The injustice is magnified where it is the court who, sua sponte and during private review of the summary judgment, claims a pleading defect thus denying the plaintiff even the knowledge that the defect is being raised, or an opportunity to respond to it until it is too late. The trial court's refusal to allow plaintiff to replead violates plaintiffs' civil right to due process. The rulings by federal appellate courts in analogous situations have consistantly found error.

The court's duty on motion for summary judgment is limited to determining whether factual issues exist, not in determining the issues themselves. Gauck

v. Meleski. Appellate courts have frequently cautioned against the use of a summary judgment procedure in cases for which that procedure was not designed. Freeman v. Continental Gin Company. A motion for summary judgment amounts to a representation by the litigants that the case is fully at issue, that all theories of liability and all defenses have been presented, and that the case is ripe for summary treatment. Pharo v. Smith. (Note in Emerick the pleadings had been closed and it was during a motion for summary judgment where the court, sua sponte, claimed to have found a pleading defect. This identical defect had already been raised by defendant on a motion to strike and resolved to defendants satisfaction!) It is prudent for judges to avoid an inquisitorial role, and not search out issues more

appropriately left to a motion by the opposing party. Lewis v. State of N.Y. @5. In rulings on motions to dismiss a pro se complaint shall be held to less stringent standards than formal pleadings drafted by a lawyer. Frankos v. LaVallee @1347. (Note in Emerick the court found that a statement by plaintiff that he "believed that a physician-patient relationship existed" did not constitute an allegation of the existance of this relationship.) While Federal Rules of Civil Procedure do not provide for sua sponte dismissal by the court, dismissals have been sanctioned in the face of a clear record of delay or contumacious, frivolous or vexatious conduct by the plaintiff. Jefferson Fourteenth Assoc. V. Wometco de Purerto Rico @526; Freeman v. Continental Gin Company. (Note that none were cited in Emerick); The

inherent power to dismiss a case that lacks merit may only be done when the party has been given notice and an opportunity to respond and, pursuant to Fed. R. Civ. P. 15, to amend his complaint to overcome any deficiencies. Jefferson Fourteenth Assoc. V. Wometco de Purerto Rico @527.

In California Diversified Promotions, Inc. v. Musick, the court on its own initiative dismissed the case. The 9th Circuit Court held that the trial court should have given notice of its intention to dismiss, and should have provided an opportunity for plaintiffs to submit a written memorandum in opposition to such motion, a hearing, and an opportunity to amend the complaint to overcome the deficiencies raised by the court. (emphasis added). This identically parallels the Emerick case and supports

the claims made here by plaintiff that he should have at least been permitted to amend his complaint to correct a pleading defect raised by the court. The due process requirements identified in Musick have been consistantly upheld in other federal appellate rulings. See Jefferson Fourteenth Assc. v. Wometco de Puerto Rico; Lewis v. State of N.Y..

It is unfortunate but argueably true, that this case reflects not complex issues of law, but the human realities of political courtesy in the buisiness of law. In a nutshell, it becomes obvious the trial court was not going to permit a non-lawyer pro se plaintiff to bring a well known forensic physician, whose brother also happens to be an appellate judge, to a jury trial. And the appellate court was certainly not going to subject the brother of it's colleague,

to a highly publicized trial by this non-lawyer pro se. I think it not unreasonable or improper to raise the spectre that this was a deliberatly bad decision at both the superior and appellate court levels. To maintain that the judiciary by definition consists of men of integrity and impartiality is a falacious and overly idealistic argument. The trial judge in this case, on presentation for judicial reappointment, was subjected to state legislative examination on issues of alcoholism and veracity. He subsequently withdrew from reappointment to the judiciary.

If the judges of the U.S. Supreme Court cannot readily explain to themselves how there was no error, and cannot draw upon a similar experiance, then it should accord the case review and

reversal in order that plaintiff, a pro se litigant, may amend his complaint to correct a pleading defect and proceed to trial with a perfectly good civil case.

CONCLUSION

A plaintiff has the civil right to be given notice of any claimed defect in his pleading, an opportunity to respond to it, and an opportunity to correct the defect prior to the dismissal or termination of his case. In EMERICK V. BORDEN this was not done, and the failure to do so violated plaintiff's civil right to due process.

Respectfully Submitted

Pro Se Petitioner

Roger Emerick

Roger Emerick

580 Hopewell Rd.

S. Glastonbury, Ct. 06073

APPENDIX TABLE OF CONTENTS

	Page
JUDGMENT OF CT. SUPERIOR COURT	1A
OPINION OF CT. APPELLATE COURT	10A
ORDER OF CT. SURPREME COURT	11A

JUDGMENT OF SUPERIOR COURT

NO. 307621

ROGER C. EMERICK	:SUPERIOR COURT
VS.	:JUDICIAL DISTRICT
WALTER BORDEN	HARTFORD-NEW BRITAIN
ET AL	AT HARTFORD
	:APRIL 29, 1987

MEMORNADUM OF DECISION

ON

MOTION FOR SUMMARY JUDGMENT

The plaintiff in this action alleges

psychiatric malpractice by the defendants, Walter and Edene Borden, in the performance of a psychiatric examination as part of a custody judgment in a dissolution of marriage action. The defendant, Walter Borden, who is licensed to practice medicine and specializes in psychiatry, was assisted by his wife, Edene Borden, in the psychiatric evaluation of plaintiff, the plaintiff's then wife and the plaintiff's child, which took place from May to July 1982. The defendant, Edene Borden, holds a masters degree in counseling.

The defendants have now moved for summary judgment, asserting that there was no physician-patient relationship between them and plaintiff. In support of the motion they offer a memorandum of law, their affidavits and other documentary proof. The plaintiff offers

his memorandum of law and affidavit, as well as the affidavits of Robert Colucci of the Family Relations Division of the Superior Court and of Gene Gordon, a licensed psychiatrist. The pleadings are closed, thus properly positioning the motion before the court.

Summary judgment may be granted "if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Conn. Pratice Bk. $ 384. To succeed in an action for malpractice, the defendants assert that the plaintiff must establish the existence of a patient-physician relationship. See Buttersworth v. Swint, 186 S.E. 770, 772 (Ga. App. 1936); Brown v. Riel, 40 S.W. 2d 621, 622 (Mo. 1931); see also Landon v. Humphrey, 9 Conn. 209,

216 (1832); and Force v. Gregory, 63 Conn. 167, 172 (1893). If the defendants can prove that no such relationship exists, they must succeed in their motion, say they. See Dean v. Hershowitz, 119 Conn. 398, 405-406, 408-409 (1935) and Sheridan v. Quanrier, 127 Conn. 279 (1940).

The pleadings do not settle the question of whether this relationship came into existence. The plaintiff's amended complaint does not allege the existence of such a relationship. It alleges the plaintiff "actually and sincerely believed a physician-patient relationship existed." The defendants neither admit nor deny this allegation, and instead leave plaintiff to his proof. The affidavits of Dr. Borden and Mrs. Borden state that plaintiff and his family were interviewed pursuant to a

court order, but they were never requested to, nor did they, treat the plaintiff or any member of plaintiff's family as a patient. The defendants' other proof, copies of a transcript and of billing statements, do not really address the issue of treatment.

The plaintiff's affidavit states that he paid for an evaluation by defendants and otherwise states that he believed that there was a physician-patient relationship between himself and defendants. See Kolibczynski v. Aetna Life & Casualty Co., 176 Conn. 676, 678-679 (1979) and the cases cited therein. Robert Colucci, Supervisor of the Family Relations Division for the Superior Court at Hartford, states in his affidavit that his office did not request a psychiatric exam in the plaintiff's case. Dr. Gordon's affidavit

states that an evaluation, like the one performed by defendants, creates a physician-patient relationship for the purposes of actions $52-146 (6) (7) of the Connecticut General Statutes. However, as to the Gordon affidavit, the definitions in those sections apply inclusively to Sections 52-146c through 52-146i relating to privilaged communications. Not only does the Gordon affidavit consist of legal conclusions, but the topic of privilaged communications bears no relationship to the present issue or the allegations of the complaint.[1] See Kolibczynski v. Aetna Life & Casualty Co., supra, and Farrell v. Farrell, 172 conn. 39 (1980).

The evidence offered in support of and in opposition to the motion does not establish whether a physician-patient relationship existed.

Nonetheless, none is alleged. Such an allegation is necessary in this state to maintain an action for medical malpractice. And while such a requirement is generally pointed out by a motion to strike; Section 151, et seq., Connecticut Practice Book; it need not; Boucher Agency, Inc. v. Zimmer, 160 Conn. 404, 409 (1971).

The palitiff is represented by himself. Consistent with our case law; Bitonti v. Tucker, 162 Conn. 626 (1972); the complaint has been examined to determine whether it states any other cause of action recognized in this state.

Research indicates that the closest situation to the present one exists where a physician is sued for disclosing information about a patient. A cause of action has been recognized in other jurisidictions where an evidentiary

privilege is recognized by the state; Clark v. Geraci, 208 N.Y.S. 2d 564 (N.Y. Sup. Ct. 1960); or where improper disclosure of such information is deemed unprofessional conduct. Id.; see Simonsen v. Swenson, 177 N.W. 831 (neb. 1920) (court apparently would have permitted the action if other factors did not exist). But see Quarles v. Sutherland, 389 S.W.2d 249 (Tenn. 1965) (although deemed to be unprofessional conduct, the only remedy is revocation of license). In this state a physician's license may be revoked for "illegal , incompetent or negligent conduct in the practice of medicine ..." Conn. Gen. Stat. $20-13c(4). By adding to the plaintiff's allegations and inferring incompetent or negligent conduct, this court probably could, on bases analogous to the Clark and Simonsen cases, create a

cause of action without requiring a doctor/patient relationship. However, the reasoning in Quarles is sound and this court would hold that any ethical violations by Dr. Borden should be viewed as remedied only by a license revocation procedure.

The court can only go so far to assist a party who appears pro se; the legitimate rights of opposing parties must also be protected. Cersosimo v. Cersosimo, 188 Conn. 385, 393 (1982).

The motion for summary judgment is granted.

Judge Richard Noren

FOOTNOTE

1. Section 52-146c, for instance, creates a limited privilege for conversation for any "individual who, for the purpose of securing psychological services, consults a licensed psychologist" even if no patient status is created. Section 52-146d(6) defines "patient" to include one "who communicates with or is treated by a psychiatrist in diagnosis or treatment" but the definition only applies to Section 52-146c to

52-146i. See Shuster v. Buckley, 5 Conn. App. 473, 477 (1985).

Opinion of the Ct. Appellate Court

17 Conn. App. 802 (Jan. 12, 1989)

ROGER C. EMERICK V. WALTER A BORDEN ET AL

(6295)

SPALLONE, NORCOTT, FOTI, Js.

Argued October 5 -- decision released October 26, 1988.

PER CURIAM. There is no error.

Order of the Ct. Supreme Court

SUPREME COURT

STATE OF CONNECTICUT

NO. PSC-88-1117

Roger Emerick

v.

Walter A. Borden et al.

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the plaintiff for certification to appeal from the Appellate Court (17 Conn. App. 802) it is hereby ordered that said petition be, and the same is hereby denied.

BY THE COURT,

Cynthia M. Gworek

Assistant Clerk- Appellate

Dated: January 12, 1989

Notice to: 1/12/89 Clerk, Superior Court, Hartford, 307621

Clerk, Appellate Court

Roger C. Emerick, pro se

Weinstein, Seltzer, Denezzo, Swirsky & Kulick

Roger Emerick, pro se in support of petition---Gerald R. Swirsky in opposition.